INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	10

CITATIONS

Cases:	
Clark Distilling Co. v. *Western Md. Railway Co.*, 242 U. S. 311	5
Ford Sedan, In re, 26 F. Supp. 146	8
Fredericka Shepp, The, 195 Fed. 623	7
Hayes v. *United States*, 112 F. 2d 417	5
Henderson's Distilled Spirits, 14 Wall. 44	7
Motlow v. *Missouri*, 295 U. S. 97	6
Texas Co. v. *Donoghue*, 302 U. S. 284	6
Teacher's Distilled Spirits, 103 U. S. 679	7
United States v. *Bags of Coffee*, 8 Cranch 398	5, 7
United States v. *Constantine*, 296 U. S. 287	5
United States v. *Grundy*, 3 Cranch 337	5, 7
United States v. *Hill*, 248 U. S. 420	5
United States v. *One Ford Coupe*, 272 U. S. 321	5
United States v. *One Oldsmobile Sedan*, 23 F. Supp. 323	8
United States v. *Pacific Finance Corp.*, 110 F. 2d 732	8
United States v. *Stowell*, 133 U. S. 1	6, 7
Constitution and Statutes:	
Twenty-first Amendment, Sec. 2	5
Anti-Smuggling Act of August 5, 1935, c. 438, 49 Stat. 517, amending 19 U. S. C. 483	8
Liquor Enforcement Act of June 25, 1936, c. 815, 49 Stat. 1928 (27 U. S. C. 221 ff.):	
Sec. 3 (a)	2
Sec. 4	2, 8
Opium Poppy Control Act of December 11, 1942, c. 720, 56 Stat. 1047, sec. 8 (21 U. S. C. 188g)	8
Miscellaneous:	
H. Rep. 1258, 74th Cong., 1st sess., p. 6	8

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 964

7 FIFTHS OLD GRAND-DAD WHISKEY, ET AL. AND W. R. HERNDON, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 17–21) is reported in ~~157~~ 158 F. 2d ~~134~~ 34. The findings of fact and conclusions of law of the district court (R. 10–15) are reported at 66 F. Supp. 121.

JURISDICTION

The judgment of the circuit court of appeals was entered November 5, 1946 (R. 21). The petition for a writ of certiorari was filed January 30, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether liquor brought into a dry state in violation of the Liquor Enforcement Act of 1936 may be seized under Section 4 of that act in the hands of the person who purchased such liquor within the state.

STATUTE INVOLVED

The Liquor Enforcement Act of June 25, 1936, c. 815, 49 Stat. 1928 (27 U. S. C. 221 ff), provides in pertinent part as follows:

> SEC. 3. (a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> * * * * *
>
> SEC. 4. All intoxicating liquor involved in any violation of this Act, the containers

> of such intoxicating liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited. Such seizure and forfeiture, and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws.

STATEMENT

The United States filed a libel of information in the District Court of Kansas, seeking the condemnation of some 458 gallons of intoxicating liquor seized by agents of the Alcohol Tax Unit on November 9, 1945. The libel alleged that the liquor, containing more than 4 percent of alcohol by volume, had been transported into the State of Kansas, a state in which all sales of such liquor were prohibited, in violation of the Liquor Enforcement Act of 1936, and were therefore subject to forfeiture under Section 4 of that Act, 27 U. S. C. 224. (R. 2–5.) The case was determined on an agreed statement of facts by which it was admitted that the liquor in question had been distilled and bottled in states other than Kansas and brought into Kansas after January 1, 1944, and prior to November 9, 1945, by parties un-

known to claimant or libelant; that claimant had purchased such liquor in the State of Kansas prior to November 9, 1945, and had stored it on his premises; that the claimant had purchased a United States retail liquor dealer stamp, and that such stamp was publicly displayed at the time of seizure; that no criminal prosecution against claimant had been instituted or was contemplated (R. 8–10). The district court held that the importation of the liquor into the State of Kansas constituted a violation of Section 3 (a) of the Liquor Enforcement Act of 1936; that by reason of such fact the liquor was forfeited to the United States at the time the violation occurred; that title passed to the United States as of the time of the commission of the offense; and hence that the seizure of the property in the hands of the claimant was lawful. It accordingly declared the liquor forfeit to the United States and directed that it be delivered to the Secretary of the Treasury for disposition according to law. (R. 10–14.) On appeal the judgment was affirmed (R. 21).

ARGUMENT

Petitioner contends that the United States had no authority to seize liquor which he had purchased in the State of Kansas, even though prior to the time of purchase, the liquor had been brought into that State in violation of the Liquor Enforcement Act of 1936.

The problem is essentially one of statutory construction and not, as petitioner would have it, one of constitutional power. No constitutional limitations prohibit the instant seizure and forfeiture. The constitutionality of the Liquor Enforcement Act, in so far as it prohibits the bringing of liquor into a dry state is not, and cannot, successfully be challenged, particularly in the light of Section 2 of the Twenty-first Amendment. *Hayes* v. *United States*, 112 F. 2d 417, 422 (C. C. A. 10); see *Clark Distilling Co.* v. *Western Md. Railway Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420. Nor is it disputed that the United States has power to declare forfeit property used in violation of its laws. *United States* v. *One Ford Coupe*, 272 U. S. 321, 329.[1] The legislature has the power to determine whether the title to property so used passes to the government immediately upon the commission of the offense or only when an offense is being committed at the time of seizure. *United States* v. *Grundy*, 3 Cranch 337, 351–352; *United States* v. *Bags of Coffee*, 8 Cranch 398, 403. When the legislature does use terms which indicate an intention to have title pass immediately, a decree of condemnation merely confirms the title which the United States

[1] The case of *United States* v. *Constantine*, 296 U. S. 287, on which petitioner relies (Pet. 8), has no application for the forfeiture here would lie, not because of the violation of a state law, but because of the violation of an admittedly valid federal statute.

has had since the time of the commission of the offense and relates back to such time. *United States* v. *Stowell*, 133 U. S. 1, 16–17. Hence, if, by the terms of the statute here involved title to the liquor passed to the United States upon the commission of the offense of importing liquor into Kansas, or if the use of the liquor in violation of law gave the Government a right of seizure, the Government would clearly have the right to seize such property wherever it could be found. It becomes immaterial whether the property is or is not in interstate commerce at the time of seizure. The Government by the seizure is not exercising its commerce power but its property right in the offending property, a property right which it has hitherto validly acquired by a proper exercise of its commerce power.[2] Cf. *Texas Co.* v. *Donoghue*, 302 U. S. 284, in which a state was allowed to complete a forfeiture proceeding in the state court even though possession of the property had passed into the hands of a federal bankruptcy court.

The narrow question here, therefore, is whether the language of the Liquor Enforcement Act of 1936 indicates an intention to have title to liquor transported into a dry state pass immediately

[2] *Motlow* v. *Missouri*, 295 U. S. 97, on which petitioner also relies (R. 16), explicitly recognizes that a judgment of forfeiture relates back to the date of the offense as proved; that decision holds merely that such relation back does not occur until there is an "effective" judgment of condemnation.

upon the commission of the offense, or whether title passes only if an offense is being committed at the time of seizure. There is no language in Section 4 of the Liquor Enforcement Act to warrant an interpretation that an offense must actually be in the process of being committed at the time of seizure. The section states explicitly that "all intoxicating liquor involved in any violation of this Act" shall be seized and forfeited.

The only possible room for difference in interpretation is whether title to the property subject to seizure passed to the United States immediately on the commission of the offense or only as of the time of seizure. It is established that where a statute provides that property used in violation of a law "shall be forfeit" title passes immediately upon the commission of the offense. *United States* v. *Bags of Coffee,* 8 Cranch 398; *Henderson's Distilled Spirits,* 14 Wall. 44, 58; *Thacher's Distilled Spirits,* 103 U. S. 679, 682; *United States* v. *Stowell,* 133 U. S. 1, 17. On the other hand, where statutes give the Government an option to take the property or its value, or where the statute provides that the offending property shall be "liable to forfeiture," it has been held that title does not pass until the time of seizure. *United States* v. *Grundy,* 3 Cranch 337; *The Fredericka Shepp,* 195 Fed. 623 (D. R. I.).

We think it is clear that the language of the Liquor Enforcement Act providing that liquor

involved in a violation of that act "shall be seized and forfeited" falls within the former category rather than the latter. No alternative remedy is given to the United States to take the value of the property rather than the property itself, and no qualifying language is employed. The Committee Report on the Act, H. Rep. 1258, 74th Cong., 1st sess., p. 6, states only that—

> Section 4 provides for the seizure, forfeiture, and disposition of intoxicating liquor, the containers thereof, and the vessel or vehicle used in the transportation thereof, if the liquor is brought into a "dry" State in a manner constituting a violation of the provisions of the bill. * * *

It is to be noted, however, that the same language as that used in the Liquor Enforcement Act, "shall be seized and forfeited," was employed by Congress the year before in the Anti-Smuggling Act of August 5, 1935, c. 438, 49 Stat. 517, when it amended 19 U. S. C. 483 for the specific purpose of providing for forfeiture of an offending vehicle at the time of the commission of the offense rather than at the time of seizure. *United States* v. *Pacific Finance Corp.*, 110 F. 2d 732–733 (C. C. A. 2); *In re Ford Sedan*, 26 F. Supp. 146 (D. Minn.); *United States* v. *One Oldsmobile Sedan*, 23 F. Supp. 323 (D. Oreg.). The same language is also employed in Section 8 of the Opium Poppy Control Act of December 11, 1942, c. 720, 56 Stat.

1047 (21 U. S. C. 188g). It is evident, therefore, that the phrase "shall be seized and forfeited" has the same meaning as the phrase, "shall be forfeit" and is intended to pass title to the United States immediately upon the commission of the prohibited act.

But, even if title passes to the Government only at the time of seizure, petitioner would still be in no position to attack the forfeiture. As we have shown, there can be no question that, under this statute, an offense need not be in the process of commission at the time of seizure. The question of the time of the passage of title becomes important only if petitioner can be considered a bona fide purchaser for value, for, in that event, if title did not pass until the time of seizure, his title would be protected against the Government's claim. Petitioner, however, cannot possibly be in such position. Under the stipulated facts, it is clear that petitioner knew that the liquor had been bottled outside the state of Kansas and transported into that state before he purchased it. He must be held to knowledge that such transportation into Kansas was illegal and rendered the property subject to forfeiture by the United States. Hence, he could not be an innocent purchaser and could not acquire a title good against the Government's claim.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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